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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

MARTIS C. SCALF,
Petitioner,

vs.

JOHN E. BENNETT, Warden,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

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TO: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner prays that a Writ of Certiorari issue to review the judgment of the Eighth Circuit Court of Appeals in the above entitled case on the 11th day of March, 1969. Petition for Rehearing en Banc was denied April 28, 1969.

OPINIONS BELOW

The Opinion on the Criminal Appeal in the Supreme Court of Iowa is reported in 254 Iowa 983; 119 NW2 868.

The Opinion of Iowa Supreme Court on appeal from State Habeas Corpus trial is found in —— Iowa ——, 147 NW2 860.

The Opinion of U. S. District Court on Habeas Corpus hearing was unreported. (Copies appended hereto).

The Opinion on appeal from Order Denying Writ in the U. S. District Court was unreported. (Copies are appended hereto, including Order Denying Rehearing en Banc).

(i) The date of the judgment sought to be reviewed is March 11, 1969.

(ii) The Order Denying Rehearing is dated March 28, 1969.

JURISDICTION

(iii) This Petition is timely filed.

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

The Defendant (Petitioner herein), who was accused of rape and convicted, contends that he was deprived of certain constitutional rights by the actions of the U. S. District Court, Southern District of Iowa, Eastern Division, and the Eighth Circuit Court of Appeals, before whom his Federal post conviction habeas corpus hearing and appeal was tried.

Petitioner contends that on:

"THE RELIGIOUS ISSUE"

the Opinion of the Eighth Circuit Court of Appeal resulted in depriving Petitioner of his liberty without due process of law, contrary to the First and Fourteenth Amendment to the United States Constitution, and Arti-

cle One, Section Four of the Bill of Rights of the Iowa Constitution, when it imposed the additional burden upon Petitioner of defending himself from the improper introduction, during the rape trial, of Petitioner's religion by the prosecutor in the State's case-in-chief, even though the court appointed "defense attorney delved more deeply into the religious issue than did the prosecution". (R—"Exhibit 1", page 12, Trial Transcript).

Petitioner contends that on:

"THE REVIEW ON APPEAL OF APPELLANT'S CONVICTION"

the Opinion of the Eighth Circuit Court of Appeal resulted in depriving Petitioner of proper consideration by the Iowa Supreme Court of his appeal from conviction in that it denied him the full benefit of Iowa Criminal Appellate Procedure without due process of law, contrary to the Iowa statutes regulating criminal appeal procedure as provided in the 1962 Iowa Code, Section 793.17 and related Rules of Civil Procedure (R.C.P. 340, page 2711) of 1962 Iowa Code, and the Fourteenth Amendment to the United States Constitution.

The Eighth Circuit Court of Appeals erred in its pronouncement that Petitioner was effectively represented on the criminal appeal to the Iowa Supreme Court when it leaned upon the Iowa Supreme Court Decision affirming the Lee County (Iowa) District Court decision on the Habeas Corpus trial and the United States District Court decision denying Petitioner the Writ, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States.

On the point designated: "INVALIDITY OF INDICTMENT", the Eighth Circuit Court of Appeals' Opinion misapprehended the purpose of the statutes contained in the 1962 Iowa Code, Sections 771.21 and 771.22, and misconstrued the legislative intent, thus depriving Peti-

tioner of due process of law guaranteed under the Fourteenth Amendment to the Constitution of the United States.

> RE: "DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL" (referred to at second paragraph, page 8 of Opinion of Eighth Circuit Court of Appeals, Appendix I, herein)

where Iowa law provides for appeal as a matter of right, and where the counsel appointed by the court to represent the indigent Petitioner did nothing to prepare and file an Abstract or Summary of the Trial Transcript as a record of errors; did not prepare a Brief and Argument based on an Abstract; did not argue orally on submission; did not file a Petition for Rehearing, the Eighth Circuit Court of Appeals was in error when it ruled that Petitioner had effective assistance of counsel, and such a ruling was in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH INVOLVE THE CASE

FIRST AMENDMENT, Constitution of the United States, (Appendix III.)

FIFTH AMENDMENT, Constitution of the United States (Appendix IV.)

SIXTH AMENDMENT, Constitution of the United States (Appendix V.)

FOURTEENTH AMENDMENT, Constitution of the United States, (Appendix VI.)

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ARTICLE ONE, SECTION TEN, Bill of Rights, Constitution of Iowa, (Appendix X.)

CODE OF IOWA (1962), Section 771.21, (Appendix XI.)

CODE OF IOWA (1962), Section 771.22, (Appendix XII.)

CODE OF IOWA (1962), Section 793.17, (Appendix XIII.)

CODE OF IOWA (1962), Rule of Civil Procedure No. 340 (Appendix XIV.)

STATEMENT OF THE CASE

Petitioner was convicted May 25, 1962, on a charge of rape set out in an indictment dated March 29, 1962.

As an indigent he was represented by two court appointed attorneys. A plea of not guilty was entered and trial was had, resulting in a sentence of 35 years confinement in the state penitentiary.

Roger C. West, one of the attorneys, took over the lead on the trial, questioning and cross-examining all but two of the witnesses. Junior counsel, Clayton C. Schisel, directed the examination of the remaining two witnesses.

The record is void of any proper resignation or withdrawal of Mr. West as Defendant-Petitioner's counsel on the appeal to the Iowa Supreme Court.

A Clerk's Short Transcript was certified up to the Iowa Supreme Court.

Mr. Schisel, alone, attempted to represent Petitioner on that appeal.

The appeal attorney filed the 221 page Trial Transcript. He neither prepared nor filed an Abstract of Errors from the Trial Transcript.

He prepared and filed a printed Brief and Argument, consisting of two alleged trial errors, and one objection to the 35 year sentence.

He did not file a request for oral argument and upon attempting to argue orally on the hearing, he was denied the right to do so on the grounds that he had failed to properly and timely request such right.

He failed to file a Petition for Rehearing on Petitioner's behalf.

The Iowa Supreme Court upheld the Iowa District Court conviction. Mittimus to the state penitentiary issued on March 13, 1963.

On December 8, 1961, February 26, 1962 and March 26, 1962, the Polk County (Iowa) Grand Juries secretly heard witnesses against Petitioner.

On February 26, 1962, the January Grand Jury heard testimony from the witness, Pauline Knight, mother of prosecutrix Joan Knight, released the day previous to her appearance as "improved", but not cured, from the Iowa Mental Health Institute where she had been confined as a "Schizophrenic Re-action: Paranoid Type".

No indictment resulted from the appearance of the witness at this time.

The following day, February 27, 1962, the assistant Polk County Attorney, Jerry Williams, signed and swore to a Des Moines Municipal Court Information which charged Petitioner with rape of the same girl (Joan Knight), the same crime and act of rape which the Polk County Grand Jury had under consideration. (The Information is Exhibit No. 5.)

Defendant-Petitioner waived preliminary hearing.

The Information, Exhibit No. 5, was duly sent to the District Court Clerk's office where it was filed on March 7, 1962.

Investigation shows that the Information, Exhibit No. 5, disappeared after it reached the March, 1962 Term Grand Jury where it was imprinted with a rubber stamp which showed:

"CASE IGNORED BY GRAND JURY",

with the date, "3-29-62", written thereon by Ben F. Alleman, Foreman of the March, 1962, Grand Jury.

The disappearance of the Information, Exhibit No. 5, encompassed a period of one year, less three days, when it showed up in the Clerk's office on March 26, 1963, with a signature placed thereon by one Joseph Bianco, who was then Foreman of the March, 1963, Grand Jury. This reappearance of the Information, Exhibit No. 5, occurred thirteen days after Petitioner was incarcerated in the penitentiary.

The chronology of this pre-trial procedure is highly significant, showing, as it does, that four important facts relating to this procedure were produced on the Habeas Corpus trials in State and Federal court and were given no weight in the Rulings and Conclusions.

(1st) The Honorable Luther L. Hill, Jr., was appointed Master by the Lee County (Iowa) District Court, April 22, 1965, to inquire into and determine the issue as to the date that the Information, Exhibit No. 5, was ignored. The Master's finding was that: "Exhibit No. 5", bears on its reverse side "CASE IGNORED BY GRAND JURY: 3-29-62".

(2nd) The deposition testimony of Ben F. Alleman, who was Foreman of the March, 1962 Term Grand Jury, given at Phoenix, Arizona on March 7, 1968, and in the record before the Eighth Circuit Court of Appeal as Exhibit No. 21, clearly and unequivocally shows at Page 3, Interrogatory 5, that the March, 1962 Term Grand Jury did ignore the rape charge against Petitioner.

(3rd) The United States District Court, and the Eighth Circuit Court of Appeals by its adoption of the Ruling of Judge Stephenson, presumed and took upon itself the assumption that it was the March, 1963 Term Grand Jury which ignored the charge, when the record is devoid of any direct or probative evidence or inference that the 1963 Term Grand Jury had anything whatever to do with this case.

(4th) No Order of the criminal trial court was ever made or entered on the records permitting the same identical charge of rape to be re-submitted to that March, 1962 Term Grand Jury, or to any future one.

On the criminal trial the subject of Petitioner's religion was introduced as part of the State's case-in-chief by the Prosecutor through a leading question to the prosecutrix. (Trial Transcript, Exhibit No. 1, Page 12).

Following this leading question, and from this point on, Petitioner's attorneys made no objection to this line of questioning and direction of the trial.

"In fact, on cross-examination and by use of defense witnesses, including appellant himself, the defense attorney delved more deeply into the religious issue than did the prosecution."

The Eighth Circuit Court of Appeal drew a distinction violative of the Fourteenth Amendment when it resolved against Petitioner by reason of the fact that the inflammatory remarks made to the trial jury in the State's closing argument were not preserved and not before the court, when, what was before the court was competent, probative testimony, the probity of which was not questioned and not denied by Respondent, namely, the acts and words of the prosecutor, when, picking up a sheaf of papers from the counsel table, he stood before the trial jury and stated, "I have enough names in here to testify against this man and his religion every ten minutes for twenty-four hours".

The Petitioner invoked Federal jurisdiction in the first instance by filing a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Iowa, Eastern Division, July 11, 1967. The Writ was annulled and Petition dismissed. Appeal thereafter was perfected to the Eighth Circuit Court of Appeal, resulting in affirmance.

REASONS FOR GRANTING THE WRIT

I.

On the question of the religious issue, the Eighth Circuit of Appeals, by adopting the Order of the United States District Court, date of October 23, 1967, erred and departed from the course of usual judicial proceedings when they failed to recognize that the Order was in serious conflict with the Trial Transcript record (Exhibit No. 1).

The Trial Transcript reveals that questions on religion were propounded by the State in its case-in-chief to the prosecutrix, the corroborating witness and to the witness, Pauline Knight.

In the Order denying the Writ, the United States District Court found that "The Trial Record reveals nothing resembling an "attack" on Petitioner's religion by the prosecutor in his case-in-chief. It was not until Petitioner presented his character witnesses, all of whom were members of his religious organization, that the prosecution by cross-examination and rebuttal delved directly into the tenets and beliefs of the Elijah Ministry as a matter of impeachment".

The Order and the record of the Trial Transcript (Exhibit No. 1) are irreconcilable.

The Eighth Circuit Court of Appeals recognized that there was a religious issue in the rape trial of Petitioner by stating in its finding that "the defense attorney en-

tered into the religious issue even more deeply than did the prosecution".

On the criminal trial of Petitioner, the State made out its prima facie case of rape by its first two witnesses, the prosecutrix and her sister.

The only issue joined in the charge was "not guilty".

Religion, no matter from whence the source, is no defense to a statutory charge of rape, and, likewise, one's religion is not an element of proof to sustain the allegation of a charge of statutory rape.

To require a defendant to be so versed in his constitutional rights as to be able to tutor his own counsel and to express objections to such a trend in his trial, would be to bind a defendant, like Prometheus, with the chains of his inept counsel, and is not in keeping with the intent or the language of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 4, of the Bill of Rights of the Constitution of Iowa.

In *Torasco* v. *Watkins*, 367 U.S. 488, the court pronounced that the right to disbelieve and also the right to believe in any creed has been recognized as being within the First Amendment to the Constitution.

According to *Abington School District* v. *Schemps*, 374 U.S. 203, the right to religious freedom under the United States Constitution requires the State to be neutral in its relations with groups of religious believers and nonbelievers.

In the case of *Engle* v. *Bitale*, 370 U.S. 421, it follows that the courts should not purport to pass upon the comparative merits of various attitudes regarding religion.

Mr. Justice Douglas, in *Gibson* v. *Florida Investigative Committee*, 9 L.Ed. 2d 929 (March, 1963), stated:

> "To think as one chooses, to believe what one wishes, are important aspects of the constitutional

> right to be let alone. * * * For the views a citizen entertains, the beliefs he harbors, the utterances he makes, the ideology he embraces and the people he associates with are no concern of government. By the First Amendment, we have staked our security on freedom to promote a multiplicity of ideas, to associate at will with kindred spirits, and to defy governmental intrusion into the precincts. * * *"

The Eighth Circuit Court of Appeals has sanctioned, in the "religious issue" raised by Petitioner, a departure from the rights and protections of the First, Sixth, and Fourteenth Amendments to the Constitution of the United States, and Article I, Section 4 of the Bill of Rights of the Constitution of Iowa.

II.

The Eighth Circuit Court of Appeals was in error when it ruled that *Entsminger* v. *State of Iowa*, 386 U.S. 748 (1967) had "no relevance" to Petitioner's claim of "INADEQUATE REVIEW ON APPEAL", and such denial of Petitioner's claim was not in accord with applicable decisions of this Court.

Entsminger, supra, held that Iowa's "Clerk's Transcript" appeal procedure is inadequate to meet the requirements of the Constitution of the United States.

The failure of Petitioner's appellate counsel to prepare and file an abstracted record of trial errors deprived Petitioner of that due process of law which flows from the Fourteenth Amendment, and as provided in the mandatory Iowa Appeal Procedure as set out in the 1962 Code of Iowa, Section 793.17 and Rules of Procedure (R.C.P.) No. 340, 1962 Iowa Code, page 2711.

It cannot be denied that Petitioner, as an indigent, on his first appeal was denied the specific right to an appeal free from constitutional doubt, not having received the benefit of a first appeal with a full printed abstract of the record, a brief and argument based on that abstracted record and an oral argument by his appellate attorney.

Petitioner's right to an adequate appeal was violated when the Iowa Supreme Court entertained his so-called appeal on:

(1) A Clerk's short transcript.

(2) A typewritten, 221 page trial transcript.

(3) No printed record of errors.

(4) A meager printed brief and argument, containing only 3 grounds for reversal, two of them being points raised as to qualification of witnesses (and the counsel for appellant had made no attempt on the trial to qualify these witnesses), and the remaining point being an objection to the length of the sentence given appellant.

(5) No oral argument requested, and none given, on behalf of appellant.

With utmost candor and commendable fairness, the Attorney General of Iowa conceded in the Entsminger case, supra, that Entsminger was entitled to an appeal free from a constitutional doubt.

And this Court agreed that the Clerk's Transcript procedure applied in the Entsminger case can "hardly be labeled adequate and effective review of the merits of the proceedings in the conviction."

The Entsminger case ruling was handed down in 1967. It was predicated upon, and liberally quoted from, the decision rendered in *Smith* v. *Bennett*, 365 U.S. 708, 6 L ed 2d 39, 81 S Ct 895 (1961).

The procedural errors and lack of due process complained of by Petitioner occurred following the Smith case.

There is no question but that Petitioner was precluded from obtaining a complete and effective appellate review of his conviction by the operation of the Clerk's Transcript procedure and he was automatically deprived of a full record, briefs and arguments on the bare election of his appointed counsel. By such action, all hope of any

adequate and effective appeal was taken from Petitioner. (*Lane* v. *Brown*, 372 U.S. 477 485, 9 L ed 2d 892, 898, 83 S. Ct. 768 (1963).

In *Weaver* v. *Herrick*, 258 Iowa 796, 140 NW 2nd 178 (1966), the Iowa Supreme Court now holds that defendant-petitioner, Weaver, "who made a proper showing that he was unable to employ counsel for his appeal was entitled to the appointment of counsel at county expense as well as a transcript of evidence and the cost of printing record and necessary briefs".

If it is unconstitutional in the year 1968 for a State Supreme Court to entertain an appeal on a Clerk's Short Transcript, how can it have been constitutional for the Court to have done so in the year 1963?

The Amendments have not been added to, or subtracted from, and what is violative today must, of necessity, have been violative at all times these Amendments have been in force, and such violation thereof subject to challenge and review.

The narrow and restrictive ruling of the Eighth Circuit Court of Appeals as to the adequacy of Petitioner's Review on Appeal is outside the guarantee of the Fourteenth Amendment to the Constitution of the United States.

III.

The Eighth Circuit Court of Appeals was in error in its decision on the "INVALIDITY OF THE INDICTMENT" returned by the March, 1962 Term Grand Jury, when it ruled that the indictment was not subject to any infirmities and "is sufficient in every respect to support the conviction".

This would be true if one closed one's eyes and merely looked at the paper upon which it was drawn.

The decision noted, by setting out in foot-notes, the Iowa Statutes 771.21 and 771.22 which govern statutory

mandates of re-submission of cases previously ignored by the same grand jury, and, based its decision on two cited cases purporting to allow a grand jury to reconsider a charge without direction of the court.

The cases cited by the Eighth Circuit Court of Appeals are: *State* v. *Collins*, 73 Iowa 542-543, 35 NW 625, 626 (1887), and *Greiman* v. *District Court*, 249 Iowa 333, 338, 86 NW 2nd 819 (1957).

The Collins case, supra, is distinguishable and is not applicable in that the facts upon which Petitioner bases his contention as to the validity of the trial indictment are not all the same as those in the Collins case.

In the Collins case it was a *later, subsequent* grand jury, not the "same" grand jury, that indicted Collins (as in the case of Petitioner).

The Greiman case is distinguishable and not applicable to Petitioner's challenge of "INVALIDITY OF THE INDICTMENT".

This case held that failure to charge petitioner at the March, 1957, term, did not require a dismissal of the prosecution where good cause to the contrary was shown; and that the order dismissing the first information did not operate as a bar to a prosecution under the second prosecution.

In Petitioner's case, there was no good cause shown, nor order of court made to resubmit the charge against Petitioner to the same March, 1962 Term Grand Jury.

The facts of both the Greiman and Collins cases are not similar to those prevailing in Petitioner's case, and it was error on the part of the Eighth Circuit Court of Appeals to apply these two cases as controlling in their disallowance of Petitioner's challenge to the validity of his indictment.

In Iowa the grand jury terms are of two months duration.

The November, 1961, Term Polk County Grand Jury, after hearing the testimony of the prosecutrix and her sister, the corroborating witness, on December 8, 1961, refused to indict Petitioner.

The January, 1962, Term Grand Jury took the testimony of Pauline Knight, mother of the prosecutrix and of the corroborating witness, on February 25, 1962, and refused to indict Petitioner.

The March, 1962, Term Grand Jury refused to indict Petitioner and evidenced such fact by stamping on the Des Moines Municipal Court Information, dated and filed February 27, 1962, the words "CASE IGNORED", "3-29-62". (The Information, Exhibit No. 5).

Iowa law is explicit that when, upon investigation, the Grand Jury refuses to find an indictment, it shall return all of said papers to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed. (Appendix XII, 1962 Code of Iowa, section 771.21.)

The rape charge against Petitioner was dated and it was stamped "IGNORED", "3-29-62". The court appointed Master found it was so dated and stamped. Ben F. Alleman, foreman of the March, 1962, Term Grand Jury, testified that the rape charge against petitioner, as then laid before it, was ignored.

After the Grand Jury ignored the charge contained in the Information, Exhibit No. 5, the Information was not seen for one year (less three days), being after Petitioner was tried and convicted and thirteen days after he was committed to the penitentiary. After such passage of time, it then appeared in the Court Clerk's office.

Petitioner was convicted and sentenced to the penitentiary without his ever knowing that the March, 1962 Term Grand Jury had ignored the charge against him, and, that he could have challenged the validity of the trial indictment.

Over one hundred years ago the New York Commissioners on Practise and Pleading submitted their report recommending the adoption of Section 270 of the New York Code of Criminal Procedure. The wording of this Section is practically identical with that of Section 771.22 of the 1962 Code of Iowa (Appendix XII herein). In recommending the adoption of this section the commissioners stated:

> "This section is designed to provide a convenient check upon the practice which now prevails, of repeated applications to the grand jury for an indictment where it has already been dismissed."

This clearly sets out the purpose of the New York, as well as the Iowa, statute and other similar statutes to provide a check on overzealous prosecutors.

In *United States* v. *Wells*, 173 Fed. 328, the Court stated:

> "We will do well to adhere to old landmarks and established principles, which are quite sufficient for bringing to trial all who are guilty of an infraction of the laws of the land. * * * The Supreme Court has said that it is better that a prisoner should escape altogether than that a judgment of conviction for an infamous crime should be sustained where the record does not show that there was a valid trial."

IV.

The ruling of the Eighth Circuit Court of Appeals on "Review on Appeal of Appellant's Conviction" also included and incorporated in it, as a related argument, the matter of

"EFFECTIVENESS OF COUNSEL".

"Effectiveness of Counsel" was not raised by Petitioner as a specific Point in his appeal to the Eighth Circuit Court of Appeals, such fact being inherent in the contention of Petitioner that he was neither properly or

legally represented in conformity with Iowa Statutes relating to appeal procedure and the Rules of the Iowa Supreme Court, and in the conduct of his criminal trial.

Other than the ispo facto evidence of the ineptness and inadequacy of counsel, found throughout the Trial Transcript and in the matters raised as to the adequacy of Petitioner's state appeal, Petitioner did not present argument or evidence specifically directed to this aspect.

However, deposition testimony of Leland S. Forrest, law professor and former Dean of Drake University Law School, was entered as Exhibit No. 14.

Petitioner's state appeal counsel is quoted in Exhibit No. 14, at page 22, as telling his former teacher and dean, that:

> "The trouble of it is, I don't have anything in the brief. I waited so long I couldn't get something printed, so I just made something to file, and I intended to take care of all those points you made in the oral argument".

The "points" the appeal counsel referred to were errors to be raised on the appeal which had been set out for him by Professor Forrest after appeal counsel had requested his assistance.

Since appeal counsel had made no request for oral argument, he couldn't very well take care of those "points" or any others, and, when he attempted to orally argue on the appeal hearing, he was denied the right since he had failed to comply with the court's rules.

When appellate counsel failed to file a printed abstracted record of trial errors, the Iowa Supreme Court, the United States District Court and the Eighth Circuit Court of Appeals, before whom such facts had been laid, were made aware of the inadequacy of Petitioner's representation when counsel allowed the case to be so submitted to the Iowa Supreme Court, and the courts can

not be justified in assuming that such a course as the appellate counsel pursued was done with either the Petitioner's approval or condonation.

Equal protection must be more than a mere show of form. It demands substance as well, and under the facts in this case, the appointed counsel was totally lacking in substantive effect. Petitioner had neither form nor substance.

The Eighth Circuit Court of Appeals in its finding that Petitioner had effective representation on his state appeal is such a departure from the usual course of judicial proceedings as to call for this Court's power of supervision.

CONCLUSION

For the reasons set out herein, certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

APPENDIX I.(a)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

Civil No. 2-428-E

Filed Oct. 23, 1967, F. E. Van Alstine, Clerk,
U. S. District Court, Southern District of Iowa

MARTIS C. SCALF,
Petitioner,

vs.

JOHN E. BENNETT, Warden,
Respondent.

ORDER

This matter is now before the Court on the application of Martis C. Scalf for a writ of habeas corpus. A return has been filed by the respondent.

On March 29, 1962, the petitioner was indicted for the crime of rape as defined in § 698.1, Code of Iowa (1958), in that he did carnally know and abuse a female child under the age of sixteen years. Jury trial was commenced on April 23, 1962, and petitioner was found guilty as charged. On May 25, 1962, petitioner was sentenced to serve thirty-five years in the Men's Penitentiary at Fort Madison. Petitioner appealed and his conviction was affirmed by the Iowa Supreme Court. *State* v. *Scalf*, 254 Iowa 983, 119 N.W.2d 868 (1963). On October 30, 1963, petitioner filed an application for a writ of habeas corpus in the District Court of Lee County, Iowa. The application was dismissed September 25, 1965, and petitioner appealed the dismissal to the Iowa Supreme Court where it was affirmed. *Scalf* v. *Bennett*, —— Iowa ——, 147 N.W.2d 860 (1967). Petitioner now seeks a writ of habeas corpus in this Court

alleging that he is being deprived of his liberty without due process of law in violation of the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. A full and fair evidentiary hearing was had in state court, a transcript thereof having been filed in this Court. Therefore, no evidentiary hearing is required, nor has one been sought by petitioner and the matter will be decided on the numerous exhibits and records in the file now before the Court. *Townsend* v. *Sain*, 372 U.S. 293, 312 (1963).

Under his First Amendment allegation, petitioner contends the prosecution made a systematic and direct "attack" throughout the trial on the religion of petitioner, and that such religious attack was wholly remote from the question of guilt or innocence of the crime charged.

Petitioner was identified at trial as an ordained minister and chairman of an organization known as the "Elijah Ministry." The mother of the victim was a member of the "Ministry" of petitioner, and it was at the meetings of the "Ministry" that the victim became acquainted with petitioner. Evidence indicated it was a teaching or doctrine of this religious sect that one "joined" or became "annointed" into the Elijah Ministry by sexual intercourse with members. The victim, although only eleven years of age, was aware of the above doctrine and had become fearful of the petitioner as head of the religion to which her mother belonged. The visit by petitioner to the apartment of the mother on the evening on which the crime is alleged to have occurred was occasioned by petitioner's work in the "ministry". Without going into the sordid details on which the charge was based, it is sufficient here to point out, as the Iowa Supreme Court did in *State* v. *Scalf*, *supra* at 990, 119 N.W.2d at 872, and *Scalf* v. *Bennett*, 147 N.W.2d at 862, that there was evidence of "debauchery, licentiousness and the defilement of an eleven-year-old child in the name of religion."

This brief statement of facts illustrates that the religious organization of petitioner was inextricably wound into the events which developed that night. It was one of the many relevant circumstances surrounding the commission of the crime which the prosecutor must necessarily refer to in order to present a logical and well-developed case. In addition most of the testimony relating to the religion of petitioner was admitted without objection. The trial record reveals nothing resembling an "attack" on petitioner's religion by the prosecutor in his case in chief. It was not until the petitioner presented his character witnesses, all of whom were members of his religious organization, that the prosecution by cross examination and rebuttal delved directly into the tenets and beliefs of the "Elijah Ministry" as a matter of impeachment. Under the circumstances of this case, therefore, it was not a violation of petitioner's First Amendment rights for the trial court to admit evidence relating to the "Elijah Ministry", nor is it shown to be so prejudicial as to amount to a denial of a fair trial.

In petitioner's allegations regarding the violation of his Fifth, Sixth, and Fourteenth Amendment rights he cites numerous specific occurrences. Many of these overlap, and the great majority pertain to a general contention that petitioner was denied due process because of ineffective and inadequate counsel. The facts surrounding this basic contention are outlined fully in the opinion of the Iowa Supreme Court in *Scalf* v. *Bennett*, —— Iowa ——, 147 N.W.2d 860 (1967). The Iowa Supreme Court in the above opinion discusses fully the claims of petitioner in regard to inadequate counsel and denied petitioner relief thereon. This Court finds that the principles discussed in that opinion fully govern this case. It would serve no purpose here to again reiterate what has already been written. This Court, therefore, adopts the opinion of the Iowa Supreme Court in *Scalf* v. *Ben-*

nett, supra, and likewise, denies the issuance of a writ of habeas corpus to petitioner on that ground.

Several of the specific allegations made by petitioner, however, deserve separate consideration. Petitioner contends there was misconduct on the part of the prosecutor in that he attempted to suppress evidence favorable to the petitioner. This is a serious allegation on a matter of grave concern to the courts. The suppression of evidence by the prosecution would clearly be a denial of due process in the conviction of petitioner. *Brady* v. *Maryland*, 373 U.S. 83 (1963). Because of the serious ramifications of such an allegation, the court has carefully searched the record and various exhibits filed in this case, but finds them devoid of any indication of suppression of evidence by the prosecution. This is also true of the allegation by petitioner that the prosecutor colluded with a newspaper reporter for the purpose of having the reporter interview the petitioner and solicit information for use against petitioner at trial. Neither the testimony of the newspaper reporter at trial, nor his later deposition, reveals any collusion or agreement with the prosecutor and he appeared unwillingly to give testimony as a rebuttal witness.[1] This contention, therefore, is completely without merit in the record now before the Court.

Petitioner asserts that his Fifth and Fourteenth Amendment rights were violated by his being tried and convicted on an illegal indictment. Petitioner bases this contention on evidence that the original information charging petitioner was ignored by the Polk County Grand Jury, but was subsequently resubmitted to the Grand Jury without an order of the court. The power of the Grand Jury to make inquiries and return indict-

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[1] To the contrary, the deposition of Robert Spiegel (Exhibit 13) the newspaper reporter referred to above, reveals that the interview with petitioner was conducted at petitioner's request.

ments is not dependent upon the order or direction of the court. The mere fact that a prior grand jury ignored the charge does not prevent a subsequent Grand Jury from making inquiry and returning an indictment, without direction from the court. *State* v. *Collis*, 73 Iowa 542, 35 N.W. 625 (1887); *State* v. *Brown*, 128 Iowa 24, 28 (1905); *Grieman* v. *District Court*, 249 Iowa 333, 338, 86 N.W.2d 819 (1957); Compare, *United States* v. *Thompson*, 251 U.S. 407, 414-16 (1919); See also, *United States* v. *Fay*, 239 F. Supp. 413 (S.D. N.Y. 1965).

Although all petitioner's specifications of violations of his constitutional rights during his state court trial have been considered, petitioner in the most part complains of matters which, if true, amount to nothing more than procedural errors. None of these alleged errors are of sufficient character to constitute a denial of due process or a deprivation of the constitutional right to a fair trial, and may not be reviewed in this proceeding. *Durham* v. *Haynes*, 368 F.2d 989 (8th Cir. 1966). Petitioner's application for a writ of habeas corpus must be denied.

IT IS ORDERED that the application of Martis C. Scalf for a writ of habeas corpus be and is hereby denied.

Dated this 23rd day of October, 1967.

/s/ ROY L. STEPHENSON
Chief Judge

APPENDIX I.(b)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

Civil No. 2-428-E

Filed Apr. 3, 1968, F. E. Van Alstine, Clerk,
U. S. District Court, Southern District of Iowa

MARTIS C. SCALF,

Petitioner,

vs.

JOHN BENNETT, Warden,

Respondent.

ORDER

This matter is now before the Court on the motion of petitioner, Martis C. Scalf, for relief from the operation of an order entered on the 23rd day of October, 1967, denying his petition for habeas corpus. The motion presently under consideration was filed November 21, 1967, and an oral hearing was held on the 28th day of December, 1967, with petitioner being represented by his counsel John L. Sloane, and William A. Clearhout representing the respondent.

In considering the motion after the above hearing, the Court noted certain discrepancies in exhibits before the Court. These discrepancies are clearly outlined by the Court in an order entered January 30, 1968. There appeared to be some question as to the date on which Exhibit 5, the preliminary information charging petitioner with the statutory rape of Joan Knight, was ignored by the Polk County Grand Jury. There was no dispute that it was for this crime petitioner was indicted on March 29, 1962 and subsequently convicted. In order that the record be clarified on this matter, the Court's order of

January 30, 1968, set a date for hearing on this issue and ordered the respondent to "produce evidence sufficient to establish the date on which the preliminary information charging Martis Cleo Scalf with the statutory rape of Joan Knight was ignored by the Polk County Grand Jury."

The hearing was held on February 15, 1968, with petitioner being represented by his counsel, John Sloane, and respondent being represented by William Clearhout and James Sell. The respondent called as a witness Michael Doyle, Clerk of the Polk County District Court, who produced and testified from the original books and records of his office. Petitioner called as a witness Bette Lysinger, Clerk of the Polk County Grand Jury, who produced the Grand Jury records and testified therefrom. In addition, petitioner called as a witness M. D. Huffman, who petitioner qualified as an expert on questioned documents. Subsequent to the hearing, petitioner also asked permission of the Court to reopen and have written interrogatories answered by Ben F. Alleman, foreman of the March Term, 1962, Grand Jury, now a resident of Arizona. Permission was granted by the Court on February 27, 1968. Respondent has objected to certain of these interrogatories as being incompetent, irrelevant and immaterial, and calling for information made secret by § 771.23 of the 1966 Code of Iowa. While it is true the interrogatories objected to may be immaterial to the ultimate disposition of the petition for habeas corpus relief, they are material and within the guidelines laid down by the Court at the hearing for revealing such information on the matter under consideration by the Court. Therefore, the objections to said interrogatories are denied, and the answers thereto will become a part of the record of the Court to be considered in determining this matter.

After reviewing the entire record now before the Court, it is the conclusion of the Court that the preliminary

information (Exhibit 5) charging petitioner with the statutory rape of Joan Knight was ignored by the Polk County Grand Jury on March 26, 1963. It is also the conclusion and finding of the Court that petitioner, Martis Cleo Scalf, was previously indicted on the same charge on March 29, 1962. The records of the Polk County District Court Clerk and Polk County Grand Jury Clerk clearly establish the above facts. Although counsel for the petitioner implied that these records had been altered or otherwise tampered with, the Court finds no evidence to substantiate such claim.

It is undisputed that the indictment rendered on March 29, 1962, is valid on its face. The indictment supersedes completely the preliminary information previously filed on the same charge. It was on this indictment, valid in all respects, that petitioner was tried and convicted in April 1962. It was, therefore, proper for a subsequent Grand Jury to ignore the preliminary information (Exhibit 5) on which a prior Grand Jury had rendered an indictment and on which a conviction had already been obtained. Such action by the Grand Jury was in no way prejudicial to petitioner and did not deny him due process.

Further, even if the facts were as contended by petitioner in his motion, the Court could only reiterate its conclusion that the same or a subsequent Grand Jury may reconsider and render an indictment on a charge which has been previously ignored or dismissed. That this may be done without direction from the Court is made abundantly clear by the authorities cited by the Court on page 5 of its order of October 23, 1967, denying petitioner's writ of habeas corpus. Petitioner's contentions are without merit and the motion for relief from the order denying writ of habeas corpus is denied.

IT IS ORDERED that the order of this Court, entered on October 23, 1967, denying the petition of Martis C. Scalf for a writ of habeas corpus should be and is hereby

amended to include the above findings and conclusions of the Court.

IT IS FURTHER ORDERED that the motion of Martis C. Scalf for relief from the operation of said order denying writ of habeas corpus should be and is hereby denied.

Dated this 3rd day of April, 1968.

/s/ ROY L. STEPHENSON
Chief Judge

APPENDIX II.(a)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 19,342.

MARTIS C. SCALF,

Appellant,

v.

JOHN E. BENNETT, Warden,
Iowa State Penitentiary, Fort Madison, Iowa,

Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

[March 11, 1969.]

Before VAN OOSTERHOUT, Chief Judge; and MATTHES and BRIGHT, Circuit Judges.

MATTHES, Circuit Judge.

Martis C. Scalf, an Iowa state prisoner, has appealed from the order of the United States District Court, Southern District of Iowa, The Honorable Roy L. Stephenson, denying his petition for habeas relief.

At the outset we note the chronology of the proceedings. On March 29, 1962, an indictment was filed in the district court of Polk County, Iowa, charging appellant with statutory rape in violation of § 698.1 of the 1958 Iowa Code. The victim was Joan Knight, who was

on the date of the offense, September 22, 1961, eleven years old. At the time appellant was apparently 53 years of age.

Appellant was represented in the 3-day trial, which ended on April 26, 1962, by two court appointed attorneys. The jury found appellant guilty as charged. On May 25, 1962, he was sentenced to imprisonment for a term of 35 years. The judgment of conviction was affirmed. *State* v. *Scalf*, 254 Iowa 983, 119 N.W.2d 868 (1963).

The appellant filed a petition for a writ of habeas corpus in the district court of Iowa on October 30, 1963. He was represented in that proceeding by the same lawyer, apparently retained, who represents him here. A full hearing was held by the state court on the habeas petition. On September 29, 1965, the petition was dismissed. This action was also affirmed. *Scalf* v. *Bennett*, 147 N.W.2d 860 (Ia. 1967).

On July 18, 1967, appellant filed a petition for writ of habeas corpus in the federal district court. In the lengthy petition prepared by counsel, to which numerous exhibits were attached, appellant alleged many errors in the state court trial and averred they were of such dimensions that he was denied due process in violation of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution.

On October 23, 1967, the district judge filed a memorandum opinion in which he reviewed the grounds relied upon for relief. After due consideration of appellant's claimed violations of his constitutional rights, Judge Stephenson stated: "[P]etitioner in the most part complains of matters which, if true, amount to nothing more than procedural errors. None of these alleged errors are of sufficient character to constitute a denial of due process or a deprivation of the constitutional right to a fair trial, and may not be reviewed in this proceeding. *Dur-*

ham v. *Haynes*, 368 F.2d 989 (8th Cir. 1966)," *cert. denied*, 390 U.S. 959 (1968).

Thereafter, appellant filed a motion for relief from the court's order of October 23, alleging that the indictment upon which he had been tried was fatally defective. In response to the motion the court reconsidered and set aside the denial of the petition for habeas corpus entered on October 23, and scheduled a hearing to afford appellant an opportunity to offer additional evidence relating to the claimed invalidity of the indictment. On February 15, 1968, a full hearing was held relating to this question. Included in the evidence were depositions taken pursuant to authorization by the court. On April 3, 1968, Judge Stephenson filed another order and memorandum opinion denying habeas relief in which he exhaustively reviewed the grounds relied upon by appellant. He found that the indictment was not subject to any infirmities, that it was valid in all respects and accordingly ruled the issue against appellant. Appellant persisted in filing additional motions, all of which were denied, and in due time, upon the granting of a certificate of probable cause by the district court, appellant perfected his appeal.

Although appellant's brief fails to conform to Rule 28 (a) (2) of the Federal Rules of Appellate Procedure, effective July 1, 1968, in that it does not contain a "statement of the issues presented for review," our liberal consideration of the brief indicates that under appellant's "points and authorities" the issues which he presents are:

(1) The trial court erred in allowing the prosecutor to "introduce the question of appellant's religion", which "resulted in depriving appellant of due process and the equal protection of the law."

(2) Appellant was deprived of an effective appeal from the judgment of conviction for the reason that only one typewritten 220 page transcript was filed in the Supreme

Court of Iowa, and because he was ineffectively represented on appeal.

(3) The state trial court erred when it permitted testimony to be given by a newspaper reporter.

(4) The prosecutor suppressed evidence favorable to appellant.

(5) The indictment was fatally defective.

The character of the asserted errors relied on to annul the conviction prompts us to direct attention to the deeply rooted principle that habeas corpus does not serve as a substitute for a review of nonconstitutional trial irregularities, and to once again recognize the limitations on the function of the courts in post conviction proceedings collaterally challenging the legality of a conviction.

More precisely, on petition for writ of habeas corpus by state prisoners errors of the state trial court are not reviewable on federal habeas corpus unless there has been a deprivation of constitutional rights such as to render the judgment void or to amount to a denial of due process. *Durham* v. *Haynes*, *supra* at 990; *Trujillo* v. *Tinsley*, 333 F.2d 185, 186 (10th Cir. 1964); *Wilson* v. *Nebraska*, 316 F.2d 84, 85-86 (8th Cir. 1963). Habeas corpus relief on the ground of incompetency of counsel or denial of effective counsel will be granted "only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation." *White* v. *McHan*, 386 F.2d 817, 818 (5th Cir. 1967); *Williams* v. *Beto*, 354 F.2d 698, 704 (5th Cir. 1965); *See Maye* v. *Pescor*, 162 F.2d 641, 643 (8th Cir. 1947). And the writ will not be used to test an indictment unless it is constitutionally defective. *Knewel* v. *Egan*, 268 U.S. 442, 446 (1925); *Bergemann* v. *Backer*, 157 U.S. 655, 659 (1895); *Johnson* v. *Beto*, 383 F.2d 197, 198 (5th Cir. 1968);

Roth v. *United States*, 295 F.2d 364, 365 (8th Cir. 1961), *cert. denied*, 368 U.S. 1004 (1962); *Keto* v. *United States*, 189 F.2d 247, 251 (8th Cir. 1951). Compare *Fay* v. *Noia*, 372 U.S. 391, 412 (1963).

THE RELIGIOUS ISSUE

This contention calls for a brief resume of the evidence. At the time of the offense, and prior thereto, appellant was, by his own admission, a self-ordained pastor in a religious sect denominated Elijah Ministry. The mother of Joan Knight and Judi Knight, 9 years old, was a member of the Elijah Ministry. Joan and Judi, according to their testimony, were generally familiar with some of the doctrines of that cult. They and their mother, Mrs. Knight, testified that it was a part of the creed of the Ministry that members would be joined to each other by acts of intercourse. Evidence of this nature was given in connection with the assaults by appellant upon Joan and Judi. They testified that appellant came to their apartment on the evening of September 22. Joan and Judi were in their bedroom when appellant entered. He began discussing the Ministry. Judi left the room. Scalf told Joan to remove the bottom part of her pajamas. She complied "because I was afraid of him." Appellant informed Joan that if she resisted [redacted] would tell us what God would do to us, and usually it would mean dying or being away from your mother; that's what he told us." At appellant's instruction, Joan lay on the bed and the act of intercourse followed. Then appellant followed a similar procedure with Judi.

We have engaged in this brief resume to show how the matter of appellant's religion entered the case. Counsel for appellant at the trial made no objection to this line of questioning by the prosecution. In fact, on cross-examination and by use of defense witnesses, including appellant himself, the defense attorney delved more deep-

ly into the religious issue than did the prosecution. Appellant, in addition to denying the act of intercourse, testified that the Elijah Ministry did not practice intercourse as a religious ritual and that it adhered to the Ten Commandments. To rebut this testimony and to impeach the credibility of appellant and his character witnesses, the prosecution produced witnesses who testified that the Ministry did practice intercourse and believed in only the two commandments: Thou shalt love thy Lord and thy neighbor as thyself.

While we do not doubt that a defendant would be deprived of due process if his religion were improperly introduced to his prejudice in a proceeding where it had no bearing, this is not such a case. We agree with the district court that the record does not disclose anything amounting to an "attack" on the appellant's religion, and that the "religious organization of petitioner was inextricably wound into the events which developed that night." The prosecution's injection of the tenets of the Elijah Ministry was for the purpose of showing "one of the many relevant circumstances surrounding the commission of the crime which the prosecutor must necessarily refer to in order to present a logical and well-developed case." We are convinced the prosecution did not unduly press the religious issue in its case. It merely presented enough background to show the jurors why Joan submitted to appellant's attack. Potentially prejudicial evidence, normally inadmissible, may be admissible if it bears upon a relevant circumstance in the case. See and compare *Scales* v. *United States*, 367 U.S. 203, 255-56 (1961); *Lisenba* v. *California*, 314 U.S. 219, 228-29 (1941); *United States* v. *Bowe*, 360 F.2d 1, 14 (2d Cir. 1966), *cert. denied*, 385 U.S. 961 (1966); *Miller* v. *Oberhauser*, 293 F.2d 29, 31 (9th Cir. 1961); *Travis* v. *United States*, 269 F.2d 928, 938-39 (10th Cir. 1959), reversed on other grounds, 364 U.S. 631 (1961); *Rosenberg* v. *United States*, 195 F.2d 583, 595-96 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

Appellant argues in connection with the religious issue that the prosecution made inflammatory remarks in his argument to the jury. The arguments of counsel were not preserved and are not here for examination. Appellant, was, however, permitted in the district court to offer testimony of persons in the courtroom relating to the so-called prejudicial argument. Although allegedly prejudicial remarks are generally not reviewable in a habeas proceeding, *see Jackson* v. *California*, 336 F.2d 521, 524-25 (9th Cir. 1964); *Chavez* v. *Dickson*, 280 F.2d 727, 735 (9th Cir. 1960), *cert. denied*, 364 U.S. 934 (1961); *cf. Miller* v. *Oberhauser*, *supra* at 31, the district court nevertheless considered this contention and resolved it against appellant. Our review of the evidence convinces us that the district court was correct in resolving this issue against appellant.[1]

THE REVIEW ON APPEAL OF APPELLANT'S CONVICTION

The thrust of appellant's argument is that his appeal from the judgment of conviction could not have received proper consideration by the Supreme Court of Iowa because only one typewritten copy of the transcript of the trial proceedings was filed. The assertion is made that "[n]o supreme court could be expected to pass around, in round-robin fashion, a 221 page typewritten transcript, and from that transcript play the role of appellate counsel." This contention is in our view frivolous. We are not inclined to assume that the Iowa Supreme Court was derelict and failed to responsibly review all issues presented on the appeal. The opinions of that court, 119 N.W.2d 868 and 147 N.W.2d 860, disprove the claim of inadequate review. Beyond doubt appellant had the full

[1] It has been held that statements concerning a defendant's religion are justified if they have a legitimate bearing on the issues. *Rosenthal* v. *United States*, 45 F.2d 1000, 1003 (8th Cir. 1930); 5 Wharton, Crim. Law & Proc. § 2172 (1957); see also *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940).

benefit of appellate procedures accorded indigent and nonindigent defendants in Iowa. *Entsminger* v. *Iowa*, 386 U.S. 748 (1967) and *Long* v. *United States*, 385 U.S. 192 (1966), are plainly distinguishable and have no relevance here.

Appellant's related argument that his counsel did not effectively represent him on appeal is likewise without merit. The Supreme Court of Iowa considered this contention at length in the opinion affirming the denial of habeas relief. 147 N.W.2d at 863-64. Judge Stephenson also delved into this question and found that counsel had made a conscientious, good faith effort to represent appellant on appeal. Tested by the standards stated above relating to review in a post-conviction proceeding of the adequacy of counsel, we have no difficulty in agreeing with the district court's conclusion.

TESTIMONY OF NEWSPAPER REPORTER

Here again appellant complains about a procedural matter which occurred during the trial. His theme is that the state prosecutor colluded with a newspaper reporter after appellant's arrest to elicit prejudicial information for use against appellant at trial. This contention is patently without foundation in fact or law. The record is abundantly clear that appellant himself solicited the interview with the reporter. There is not an iota of evidence to support the assertion that the interview resulted from collusion or any wrongdoing by the prosecutor. Furthermore, there was no objection to the reporter's testimony. We have examined it and find nothing therein indicative of error reaching constitutional dimensions.

SUPPRESSION OF EVIDENCE

The district court was concerned over the contention that there was misconduct by the prosecutor in attempting to suppress evidence favorable to appellant. In this

connection, Judge Stephenson stated: "This is a serious allegation on a matter of grave concern to the courts. The suppression of evidence by the prosecution could clearly be a denial of due process in the conviction of petitioner. *Brady* v. *Maryland*, 373 U.S. 83 (1963)." And habeas corpus will lie to remedy a prejudicial non-disclosure. *Levin* v. *Katzenbach*, 363 F.2d 287, 291 (D.C. Cir. 1966); *see Ingram* v. *Peyton*, 367 F.2d 933, 936 (4th Cir. 1966); *Barbee* v. *Warden*, 331 F.2d 842, 846 (4th Cir. 1964). It is evident that because of the serious ramifications of such an allegation Judge Stephenson carefully searched the record and various exhibits and found them "devoid of any indication of suppression of evidence by the prosecution."

We, too, have examined the voluminous file and detect no evidence to support this charge. Appellant relies on two incidents developed in the hearing in the state habeas corpus action. Our review satisfies us that the district court correctly analyzed the evidence relating to these incidents and properly concluded that they were wholly insufficient to establish any attempt to suppress evidence favorable to appellant.

INVALIDITY OF INDICTMENT

The indictment was not challenged before or during the trial in the state court. This issue was raised for the first time in appellant's state court petition for habeas relief. Apparently, the controversy was precipitated by a notation on the information filed in the Municipal Court of Des Moines, Iowa, reading: "Case ignored by Grand Jury." [2]

Appellant's position in the district court and here is that the quoted language shows that the March 1962 grand jury had initially refused to indict appellant but

[2] The information charged appellant with the offense in issue here.

thereafter on March 29, 1962, the same grand jury returned the true bill and that this procedure violated §§ 771.21 and 771.22, Iowa Code 1962.[3]

As we have seen, Judge Stephenson reopened the case. Appellant was permitted to explore in depth the asserted invalidity of the indictment. The issue was delineated to the question of whether the March 1962, or the March 1963, grand jury had ignored the information. This posed a fact situation. Based upon the evidence Judge Stephenson found:

> "After reviewing the entire record now before the Court, it is the conclusion of the Court that the preliminary information (Exhibit 5) charging petitioner with the statutory rape of Joan Knight was ignored by the Polk County Grand Jury on March 26, 1963. It is also the conclusion and finding of the Court that petitioner, Martis Cleo Scalf, was previously indicted on the same charge on March 29, 1962. The records of the Polk County District Court Clerk and Polk County Grand Jury Clerk clearly establish the above facts. Although counsel for the petitioner implied that these records had been altered or other-

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[3] § 771.21 provides in pertinent part that if the grand jury refuses to find an indictment the court must order the discharge of the defendant from custody and the exoneration of bail if he is on bond, unless the court, upon good cause shown, directs the charge should again be submitted to the grand jury.

§771.22 provides that "a dismissal of the charge does not prevent the same from being submitted to a grand jury as often as the court may direct; but without such direction it cannot be again submitted." Appellant contends that under this section the charge could not be considered by the same grand jury without an appropriate order of the court and that such order was not made.

Even accepting appellant's contention that the same grand jury rendered a true bill on a previously ignored information there would be no error under Iowa law. § 771.22 has been construed by the Iowa courts to allow a grand jury to reconsider a charge without direction of the court. *Greiman* v. *District Court*, 249 Ia. 333, 338, 86 N.W.2d 819, 821-22 (1957); *State* v. *Collis*, 73 Ia. 542, 543 35 N.W. 625, 626 (1887).

wise tampered with, the Court finds no evidence to substantiate such claim.

"It is undisputed that the indictment rendered on March 29, 1962, is valid on its face. The indictment supersedes completely the preliminary information previously filed on the same charge. It was on this indictment, valid in all respects, that petitioner was tried and convicted in April 1962. It was, therefore, proper for a subsequent Grand Jury to ignore the preliminary information (Exhibit 5) on which a prior Grand Jury had rendered an indictment and on which a conviction had already been obtained. Such action by the Grand Jury was in no way prejudicial to petitioner and did not deny him due process."

We have with painstaking care examined all of the evidence and are fully convinced that Judge Stephenson's findings are supported by the overwhelming weight of the evidence. The conclusion is inescapable that the indictment is not subject to any infirmities and is sufficient in every respect to support the conviction.

In summary, it is convincingly clear that the voluminous record amassed as a result of the diligent efforts of counsel, wholly fail to demonstrate a denial of due process or the deprivation of any constitutional safeguard. In the exercise of an abundance of caution, the able and conscientious district judge permitted appellant to delve into matters ordinarily not reviewable in a habeas corpus proceeding. We, too, have explored in depth the alleged constitutional infirmities and are satisfied that none exist.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX II.(b)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 19342

MARTIS C. SCALF,

Appellant,

vs.

JOHN BENNETT, Warden

Appeal from the United States District Court for the Southern District of Iowa.

There is before the Court appellant's petition for rehearing en banc and on consideration of such petition, it is the order of the court that the petition for rehearing en banc be, and it is hereby, denied.

It is further ordered that the petition for rehearing be, and it is hereby, denied.

April 28, 1969.

APPENDIX III.

FIRST AMENDMENT, Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
>
> (1962 Code of Iowa, Constitutions Federal and State, page lxi).

APPENDIX IV.

FIFTH AMENDMENT, Constitution of the United States:

> "No person shall be held for answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * *; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *."

(1962 Code of Iowa, Constitutions Federal and State, page lxii).

APPENDIX V.

SIXTH AMENDMENT, Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

(1962 Code of Iowa, Constitutions Federal and State, page lxii).

APPENDIX VI.

FOURTEENTH AMENDMENT, Constitution of the United States:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(1962 Code of Iowa, Constitutions Federal and State, page lxiii.)

APPENDIX VII.

CONSTITUTION OF THE STATE OF IOWA, Article I., Bill of Rights, Religion. Section 3.:

"The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry."

(1962 Code of Iowa, Constitutions Federal and State, page lxviii.)

APPENDIX VIII.

CONSTITUTION OF THE STATE OF IOWA, Article I., Bill of Rights, Section 4., Religious test—witnesses.:

> "No religious test shall be required as a qualification for any office, or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion; and any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law."
>
> (1962 Code of Iowa, Constitutions Federal and State, page lxviii.)

APPENDIX IX.

CONSTITUTION OF THE STATE OF IOWA, Article I., Bill of Rights, Section 9. Right of trial by jury—due process of law.:

> "The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by a jury of less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law."

(1962 Code of Iowa, Constitutions Federal and State, page lxix.)

APPENDIX X.

CONSTITUTION OF THE STATE OF IOWA, Article I., Bill of Rights, Section 10. Rights of persons accused.:

> "In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the accusation against him, to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and, to have the assistance of counsel."
>
> (1962 Code of Iowa, Constitutions Federal and State, page lxix.)

APPENDIX XI.

1962 CODE OF IOWA, Section 771.21:

"No indictment found.—effect. If, upon investigation, the grand jury refuses to find an indictment, it shall return all of said papers to the court, with an endorsement thereon, signed by the foreman, to the effect that the charge is dismissed, and thereupon the court must order the discharge of the defendant from custody if in jail, and the exoneration of bail be given, unless the court, upon good cause shown, direct that the charge should again be submitted to the grand jury, in which case the defendant may be continued in custody, or on bail, until the next term of court."

(1962 Code of Iowa. Duties of Grand Jury. page 2609).

APPENDIX XII.

CODE OF IOWA (1962), Section 771.22.:

"Effect of dismissal. Such dismissal of the charge does not prevent the same from being submitted to a grand jury as often as the court may direct; but without such direction it cannot be again submitted."

(1962 Code of Iowa. Duties of Grand Jury. page 2609).

APPENDIX XIII.

CODE OF IOWA (1962). Section 793.17.:

"Appeals. Rules of procedure. The record and case may be presented in the supreme court by printed abstracts, arguments, motions, and petitions for rehearing as provided by its rules; and the provisions of law in civil procedure relating to certification of the record and the filing of decisions and opinions of the supreme court shall apply in such cases."

(1962 Code of Iowa. Appeals. page 2642).

APPENDIX XIV.

CODE OF IOWA (1962), Rule of Civil Procedure No. 340.:

"Record on Appeal.

(a) Promptly after taking an appeal to the supreme court, appellant shall file with the clerk of the trial court duplicate typewritten abstract of so much of the record in that court, including pleadings, evidence, rulings, orders, judgment and all proceedings in the case, as is material to the appeal. Where exhibits will be copied in full in the printed record, the abstract may so state and refer to them by letter, number or other appropriate designation, without copying them.

The reporter's transcript shall be filed at the same time; and these rules relative to it shall also apply to bills of exceptions under Rule 241. The cost of the transcript shall be taxed in the trial court.

The clerk shall forthwith notify the attorneys of record for the appellee of such filing.

(b) If the abstract does not embrace the whole record, and all evidence and proceedings in the transcript, depositions and exhibits, it shall include a concise statement of all points upon which appellant will rely on the appeal, which shall be limited thereto.

(f) The abstract allowed as above or under paragraph (h) hereof shall constitute the record on which the cause shall be submitted on the appeal. The appellant shall cause it to be printed, so as also to contain in full any exhibits designated in the abstract by number alone, as provided in paragraph (a) hereof.

(h) Instead of proceeding under paragraphs (b) and (c) hereof, the parties may file with or include in the abstract proposed by any party to the appeal,

their written agreement that it is correct. The trial court shall thereupon certify that such abstract has been so agreed to, and is the record on appeal.

(1962 Code of Iowa, Supreme Court Rules and Statutes, page 2711 and page 2712.)